NO. 89 - 1129

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GEORGE HERTZKE, et al.,
Petitioners

v.

JOHN RILEY, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MARINETTI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly applied DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), to the facts of this case?

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Respondent Ralph Marinetti respectfully requests that the Court deny the petition for a writ of certiorari which seeks review of the Court of Appeals' affirmance of the District Court's dismissal of this case.

COUNTERSTATEMENT OF THE CASE

The petitioners, Sharon and George Hertzke and their son Shawn, are participants in the Federal Witness Protection Program (hereinafter "FWPP" or "the program"). They seek review of the Court of Appeals' affirmance of the District Court's dismissal of their civil rights action which asserted a cause of action based on their participation in the FWPP.

1. Petitioners filed their action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §§ 1983 and 1985(3) against the United States Drug Enforcement Agency and various federal and state law enforcement officers and

officials including Ralph Marinetti, a Corporal with the Pennsylvania State Police Strike Force.

2. In 1983, Sharon Hertzke voluntarily assisted police in the course of a drug investigation. (Dep., pp. 35-50).[1] As part of the investigation, Ms. Hertzke signed memoranda of consent to be body wired. (Dep., pp. 55-69; 206-208). Subsequently, the Hertzkes agreed to participate in the Federal Witness Protection Program and signed a memorandum of understanding to this

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[1]"Dep." refers to Ms. Hertzke's deposition which was attached to Respondent Marinetti's Motion for Summary Judgment as Exhibit III.

effect. (C.A. App., pp. 129a-137a).[2]

Contrary to petitioners' statement of facts, there are no facts of record to support the contention that it is a "violation of federal and state law enforcement practice" to use an ordinary civilian as a confidential informant. (Petition, p. 7). Likewise, there are no facts of record to support the assertion that respondents "conspired with each other to induce" Sharon Hertzke to assist them in their investigation. (Petition, p. 6). Contrary to petitioners' claim, respondent Marinetti did not make any

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[2]"C.A. App." refers to the Appendix which petitioners filed in the Court of Appeals.

"representation to [Ms. Hertzke] concerning lifelong compensation for her services." (Petition, p. 8). Respondent Marinetti never participated in arranging for the Hertzkes' placement in the FWPP. (Petition, p. 9). The Hertzkes are voluntary participants in the FWPP and can leave the program at any time. (C.A. App., pp. 130a-148a).

In their lawsuit, petitioners claim that the methods which respondents used to gain Sharon Hertzke's cooperation in the investigation were coercive and that the placement of them in the witness protection program resulted in a violation of their constitutional right to liberty under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Respondents moved for summary judgment on the grounds that petitioners failed to state a claim for deprivation of any right guaranteed by the United States Constitution and that the statute of limitations and various forms of immunity barred petitioners' claims. The District Court granted respondents' motions and dismissed petitioners' complaint finding that petitioners had failed to allege a constitutional violation. Relying on this Court's analysis in DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), the District Court found that the restraints imposed on petitioners by the FWPP do not encroach on any liberty rights

secured by the constitution. The Court of Appeals summarily affirmed.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT ISSUE TO JUSTIFY REVIEW BY THE COURT

1. Petitioners have offered no reasons to justify the Court's exercise of discretionary review. They have pointed to no important and unsettled issue for resolution by the Court, nor do they argue that a decision by the Court is necessary to resolve a conflict among the circuits. Rather, they present a peculiar set of facts[3]

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[3]Many of petitioners' allegations, moreover, are unsupported by the record and unnecessary to revolving this matter.

and argue that the lower courts decided their case wrongly. Petitioners claim that review is appropriate because the Court of Appeals "rendered a decision sanctioning a lower court order which has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision." (Petition, p. 13). In reality, though, petitioners' argument amounts to nothing more than an assertion that the lower courts erred in characterizing and analyzing their claims. On certiorari, the Court reviews cases of significance; it does not sit simply to reconsider legal rulings by lower courts, even arguably erroneous ones.

2. In any event, the District Court correctly concluded that under DeShaney v. Winnebago County Department of Social Services, No. 87-154 (U.S. Feb. 22, 1989), petitioners' participation in the FWPP does not infringe on their liberty rights secured by the constitution.

According to DeShaney, the Due Process Clause only restricts state action; it does not obligate the state to protect an individual against private violence. Id. at 5-7. No special relationship is created that obligates the state to protect or care for an individual merely because the state knows of the individual's plight and has declared its desire to help him or her.

Id. at 7-10. Rather, the Constitution imposes an affirmative duty upon the state to care for the safety and general well-being of an individual only when the state takes the individual into its custody and holds him or her there against his or her will. Id. at 10. Thus, the critical question here is whether the government, specifically the respondents, have taken the Hertzkes into custody and hold them against their will.

The Hertzkes' participation in the FWPP does not amount to custody because, unlike the imprisoned and the institutionalized, they are not under the daily control of the government nor are they wholly dependent upon the

government for their survival. Even if the Hertzkes are in the government's custody, they are not being held in the FWPP "against their will." Ms. Hertzke voluntarily participated in the investigation. Likewise, she and her family voluntarily entered the FWPP. Their continued participation in the program is entirely voluntary. They have entered and reentered the program four times. Although the Hertzkes claim that their freedom to leave the program is illusory because their lives are allegedly in danger, the Due Process Clause does not guarantee the Hertzkes' protection against harm from third persons. Id. at 7-10. Therefore, the Hertzkes' due process liberty rights have not been violated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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